

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
2002 Biennial Regulatory Review – Review)	
of the Commission’s Broadcast Ownership)	
Rules and Other Rules Adopted Pursuant)	MB Docket 02-277
To Section 202 of the Telecommunications)	
Act of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	
Newspapers)	MM Docket 01-235
)	
Rules and Policies Concerning Multiple)	
Ownership of Radio Broadcast Stations in)	MM Docket 01-317
Local Markets)	
)	
Definition of Radio Markets)	MM Docket 00-244
)	
Definition of Radio Markets for Areas)	
Not Located in an Arbitron Survey Area)	MB Docket 03-130

PETITION FOR RECONSIDERATION

**CAPITOL BROADCASTING
COMPANY, INC.**

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September 4, 2003

SUMMARY

Capitol Broadcasting Company, Inc. (“CBC”) hereby requests that the Federal Communications Commission (the “Commission”) reconsider and reverse its decisions to retain the UHF discount loophole and to ignore duopolies and triopolies when calculating the national television ownership percentage (the “National Cap”). CBC also requests that the Commission immediately begin a comprehensive analysis of the impact of the new rules promulgated in this proceeding to determine if collectively they are consistent with the public interest and will ensure the Commission’s core values of localism, diversity and competition, particularly viewpoint diversity, a paramount objective of this Commission. If, upon review, the Commission, with input from the public, finds that the new rules are inconsistent with the public interest, the Commission should reverse and revise the rules accordingly.

The UHF loophole should be eliminated for four reasons: 1) The Commission failed to adequately consider the UHF discount and, therefore, wrongly determined that it remains necessary in the public interest; 2) The Commission’s treatment of the UHF discount undermines its own commitment to regulatory certainty; 3) The Commission ignores changes in the modern media marketplace in order to retain the UHF discount, while, at the same time, relying on those changes to justify other rule changes; and 4) The Commission’s inconsistent treatment of UHF stations across its various media ownership rules defies its own goal of consistency in its rules.

The Commission should count duopolies and triopolies when calculating the national TV ownership percentage to avoid concentrating too much *potential* political power in the hands of a single media outlet at the national, state and local level. The Commission has emphatically stated that media outlets possess significant *potential* power in our system of government and in their ability to influence public opinion, but the interplay between the Commission’s expanded

local and national TV ownership rules allows a single company the *potential* to exert an inordinate effect on public opinion and to possess significant power in our system of government on all levels. Through its ownership of local television stations, a single company could influence the outcome of the election of 98 U.S. Senators, 382 members of the U.S. House of Representatives, 49 governors, and 49 state legislatures, as well as countless local races. This result is inconsistent with the Commission's own sound policy objective limiting the *potential* power of a single media company.

Although the Commission reviewed its new media ownership rules individually, with guidance from its Diversity Index, there is no indication that the Commission analyzed the collective impact of the new rules on the public interest and the Commission's core values of localism, diversity and competition, particularly viewpoint diversity, a paramount objective of this Commission. The Commission should conduct a comprehensive analysis of the impact of its new rules and determine if collectively the result will be harmful to the public interest and viewpoint diversity. If the Commission does find that the new rules collectively will not achieve their public interest purpose, the Commission should reconsider its prior action and make changes as may be necessary. As the Commission's chairman stated during his August 20, 2003 press conference, "any day is a good day to be doing something for the public."

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To the Commission:

PETITION FOR RECONSIDERATION

I. INTRODUCTION

Capitol Broadcasting Company, Inc. (“CBC”),¹ pursuant to Section 1.106 of the Federal Communications Commission’s (the “Commission”) rules, 47 C.F.R. § 1.106, hereby petitions the Commission to reconsider and reverse certain rules adopted in the *Report and Order*

¹ CBC is the licensee of WRAL-TV, WRAL-DT, WRAZ-TV, WRAZ-DT and WRAL-FM, Raleigh-Durham, North Carolina; WJZY-TV and WJZY-DT, Belmont, North Carolina; WWWB-TV and WWWB-DT, Rock Hill, South Carolina; and WILM-LPTV, Wilmington, North Carolina.

(“Order”) in the above-captioned proceedings.² As the licensee of four full-power analog television stations, four digital television stations, one low-power television station, and one radio station, CBC has been active in this proceeding meeting with Commissioners, staff personnel and submitting *ex parte* filings.³ CBC’s Petition for Reconsideration relies on facts presented in the Order, the Commission’s analysis of those facts, and the specifics of the resulting new rules – all of which were unavailable prior to the release of the Order on July 2, 2003.⁴ CBC seeks reconsideration of the following aspects of the Order:

- The Commission should reverse its position and remove two harmful loopholes within the national TV ownership rule (the “National Cap”) – the UHF discount and the failure to account for duopolies and triopolies when calculating the national television ownership percentage.
- The Commission should review the collective impact of the new rules on a national, state and local level to determine if the results of that review are consistent with the public interest and the Commission’s core values of localism, diversity and competition, particularly viewpoint diversity, “a paramount objective of this Commission.”⁵ If the Commission finds that the collective impact of the new rules is inconsistent with the public interest, it should reconsider and revise its rules accordingly. The public must have an opportunity to review and comment on the Commission’s analysis.

² FCC 03-127, adopted June 2, 2003 and released July 2, 2003 (“Order”).

³ 47 C.F.R. § 1.106(b)(1).

⁴ 47 C.F.R. §§ 1.106(b)(2), 1.106(c).

⁵ Order at ¶ 32.

II. THE COMMISSION SHOULD RECONSIDER AND REVERSE ITS DECISION TO RETAIN TWO HARMFUL LOOPHOLES WITHIN THE NATIONAL TV OWNERSHIP RULE

A. The UHF Discount is Harmful to the Public Interest and is Inconsistent with the Commission's Congressional Mandate, the Commission's Goal of Regulatory Certainty, the Modern Media Marketplace, and the Commission's Other Media Ownership Rules and Should Be Eliminated

The effect of the UHF loophole is to change the national TV ownership rule to permit a single company to own television stations that reach 90% of the television households in the United States ("U.S.") rather than 45%. The UHF discount, which attributes only 50% of the television households in a Designated Market Area ("DMA") to an entity's national ownership percentage, is no longer in the public interest. Moreover, it is inconsistent with the Commission's Congressional mandate, the Commission's goal of regulatory certainty, the modern media marketplace, and the Commission's other media ownership rules. The UHF discount no longer has any relevance and should be eliminated immediately. A loophole that **doubles** the National Cap as set by the Commission requires additional consideration from the Commission for the following reasons:

- 1) The Commission failed to adequately consider the UHF discount and, thus, wrongly determined that the UHF discount remains necessary in the public interest. The Order addresses this harmful loophole only briefly. In the post-adoption editing process, the Commission added some notations "to respond to weaknesses in reasoning and outcomes identified by the dissents" and the addition of "discussions further justifying . . . the disparate treatment of UHF stations in our local and national ownership rules" according to Commissioner Kevin J. Martin in his statement

accompanying the Order.⁶ The Commission's failure to adequately consider the loophole's consequences, intended or unintended, justifies reconsideration. As a result, CBC petitions the Commission to further examine whether the UHF discount is consistent with the Commission's mandate in Section 202(h) of the Telecommunications Act of 1996 to determine if its ownership rules are necessary in the public interest and to repeal or modify any that are not.

- 2) The Commission's treatment of the UHF discount undermines its own commitment to regulatory certainty. Although the Order purports to put an end to market uncertainty,⁷ the National Cap remains in limbo with the Commission's action and inaction regarding the UHF discount. While the Commission acknowledges that the digital transition will eliminate the technical basis for the UHF discount,⁸ it fails to provide clear rules to address this pending marketplace change. The Commission retained the UHF discount for now;⁹ sunset the discount for stations owned by ABC, CBS, FOX and NBC "as the digital transition is completed on a market by market

⁶ Statement of Commissioner Kevin J. Martin with Order, fn. 29.

⁷ See Order at ¶ 5 ("Inaction on our part and the market uncertainty that would result from a perpetuation of the open-ended policy limbo that exists today would ill serve our nation. The adoption of this *Order* is critical, therefore, to the realization of our public interest goals in that it puts an end to any uncertainty regarding the scope and effect of our structural broadcast ownership rules.").

⁸ Order at ¶ 591 ("At this point, however, it is clear that the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized.").

⁹ Order at ¶ 500.

basis” unless the Commission decides to continue it;¹⁰ and postponed a decision on whether to sunset the discount for other station owners until a subsequent biennial review.¹¹ When is the digital transition complete on a market-by-market basis? How does an owner come into compliance when the loophole sunsets – divestiture or grandfathering? Will stations acquired after the Order with notice of the sunset provision be treated differently than those acquired prior to the Order? Why provide a sunset provision that just affects the ABC, CBS, FOX and NBC owned stations when the digital transition will affect all stations and all owners? Which subsequent biennial review? The Commission states “[B]ased on the record and our own experience administering structural ownership rules, we conclude that the adoption of bright line rules, on balance, continues to play a valuable role in implementing the Commission’s goals.”¹² There are no UHF bright line rules related to the digital transition. There is no market certainty. There are only questions.

- 3) The Commission ignores changes in the modern media marketplace related to UHF stations and fails to consider any of the data submitted by CBC in its May 29, 2003 *ex parte* filing.¹³ First, during the Order’s 20 pages devoted to the modern media

¹⁰ See Order at ¶ 591 (“This sunset will apply unless, prior to that time, the Commission makes an affirmative determination that the public interest would be served by continuation of the discount beyond the digital transition.”)

¹¹ *Id.*

¹² Order at ¶ 80.

¹³ *Ex parte* letter, Capitol Broadcasting Company, Inc., MB Docket 02-277 (filed May 30, 2003) (“CBC 5/29/03 *ex parte* letter”)

marketplace,¹⁴ the Commission never mentions advances that have equalized UHF and VHF stations and later minimizes them in its National Cap discussion. While the Commission predicates most of the new ownership rules on changes in the modern media marketplace, the Commission ignores those changes related to the UHF discount, including trivializing mandatory cable (and satellite) carriage, disregarding the Commission's own rules that allow UHF stations greater operating power limits, and elevating the importance of non-comparable ratings.¹⁵ Today's modern media marketplace actually shows the following:

- a. Must carry and carry one/carry all, in concert with today's multichannel video reach of 85% of TV households, have equalized the playing field between UHF and VHF stations.
- b. Utilizing maximum power levels established by the Commission, UHF's and VHF's can now achieve almost equivalent coverage areas, negating the original intent of the UHF discount.¹⁶

¹⁴ Order at ¶¶ 86-128.

¹⁵ Order at ¶¶ 585-588.

¹⁶ CBC 5/29/03 *ex parte* letter ("First, we offer a side-by-side comparison of CBC's two analog stations located in Raleigh, North Carolina – a VHF, WRAL-TV Channel 5 (CBS – 100KW), and a UHF, WRAZ-TV Channel 50 (FOX – 5 million watts located 230 feet below WRAL-TV on the same tower). Utilizing maximum power levels allowed by the Commission, we achieve almost equivalent coverage. According to a comparison prepared by Cohen, Dippell and Everist, P.C. in May 2003, there is less than a 6% difference between our VHF and UHF signals based on the actual interference-free population reached within the Grade B service areas according to Longley-Rice. Our VHF station reaches approximately 1.8 million people, while our UHF reaches approximately 1.7 million. Therefore, the difference in off-air reach between the VHF and UHF signals is less than 6% □ not 50% as implied by the current rule.")

- c. Although CBC questions the appropriateness of ratings as a justification for the UHF loophole, CBC offers the following comparison of FOX UHF and VHF affiliates in the top 50 markets.

Top 50 TV Markets¹⁷
FOX Affiliates Prime-Time Ratings/Shares

Top 50 Markets	DMA Homes Rating	DMA Homes Share	Persons 18-49 Rating	Persons 25-54 Rating
VHF FOX Affiliates (25 VHF stations)	8.9 (8.6% greater than UHF)	13.0 (8.2% greater than UHF)	7.4 (4.2% greater than UHF)	7.3 (5.8% greater than UHF)
UHF FOX Affiliates (24 UHF stations)	7.5	11.0	6.8	6.5

A.C. Nielsen Reported Ratings February 2003¹⁸

The difference between a VHF and UHF FOX affiliate based on ratings ranges from 4.2% to 8.6%, not 50%. Any discount should be relevant to the current marketplace. According to most brokers, station values today are based upon cash flow (which results from ratings and, in turn, advertising sales) and network affiliations, not whether it is a UHF or a VHF facility – making the FOX empirical data more credible than comparing ratings and values of the less established networks, which also have a lot of UHF affiliates. The value of the latter stations is based upon lack of ratings and programming offered by a less popular network. In addition, as stated above, the Commission fails to establish clear rules to deal with the digital transition, when according to the Commission’s own Digital Table of Allotments, 94%

¹⁷ This is actually 49 of the top 50 markets with Boston not reporting.

¹⁸ CBC 5/29/03 *ex parte* letter.

of all stations will be UHF, representing a significant modern media marketplace change. Finally, the Commission's justification for the UHF discount based upon its desire to promote new networks is a laudable goal, although perhaps unrealistic based upon today's marketplace. With the pending digital transition and with the expanded local TV rule concentrating stations in the hands of current owners, it is unlikely any new network will launch.

- 4) The Commission's inconsistent treatment of UHF stations across its various media ownership rules defies its own goal of consistency to comply with directives from the U.S. Court of Appeals for the District of Columbia Circuit. The national TV ownership rule is the Commission's only ownership rule that makes a distinction between UHF and VHF television stations for counting purposes. Both the local TV ownership rule and the cross-media rule count UHF and VHF stations the same. Apparently, as previously discussed, according to Commissioner Martin, the Commission's response to the UHF inconsistency between the local and national rules was done post-adoption editing. It is a baffling comparison between the Commission's top four-station restriction in the local rule to the UHF loophole in the national rule.¹⁹ The Commission also notes

¹⁹ Order at fn. 411 ("The local television ownership rule is consistent with a key aspect of our national television ownership rule in recognizing competitive disparities among stations. Our national television ownership cap recognizes competitive disparities between stations through use of the UHF discount, while our local television ownership cap recognizes competitive disparities between stations by prohibiting mergers of the top four-ranked stations in a market. The national ownership rule is an audience reach limitation, so it makes sense to adjust that limitation based on the diminished coverage of UHF stations. The local ownership rule, on the other hand, places a limitation on the number of stations that one entity may own in a market. Thus, that rule limits mergers of the top four-ranked stations in a market. Furthermore, in the

that in the local rule it will take account of a station's UHF status in considering waiver requests. If it will consider waiver requests on a case-by-case basis in the local rule, should there not be a comparable opportunity in the national rule? Should all UHF stations automatically represent a 50% discount? For consistency purposes, should the Commission also look at UHF stations in the national ownership rule on a case-by-case basis? The Commission's own Diversity Index, which serves as the basis for its cross-media limits, treats UHF and VHF stations the same, noting that "our signal carriage rules more or less equalize the coverage of all television stations in a particular DMA."²⁰ "The underlying assumption here is that all outlets have at least similar technical characteristics."²¹ Further, although when justifying the UHF loophole in the National Cap, the Commission takes into account the actual coverage of the television signal, it takes a different position in the local radio rule, stating "[B]ut radio stations serve people, not land."²²

In summary, the Commission should reverse its decision to retain the UHF discount in the national TV ownership rule because it is no longer necessary in the public interest and is

local television ownership rule, we take account of a station's UHF status in considering certain waiver requests, as discussed further below. Finally, we note that the top-four merger restriction in our local television ownership rule and the UHF discount in our national television ownership rule, while analogous, are not identical and do not serve exactly the same purpose. The UHF discount is premised, in part, on promoting the development of new and emerging networks. This rationale does not apply in the local television ownership context because ownership of multiple stations in a market does not promote development of new networks. The top-four limitation in the local television ownership rule, in contrast, is premised on competition theory, which is not the basis for the national television ownership rule.").

²⁰ Order at ¶ 421.

²¹ Id.

inconsistent with the Commission's Congressional mandate, the Commission's goal of regulatory certainty, the modern media marketplace, and the Commission's other media ownership rules. In the alternative, the Commission should sunset the UHF discount with the digital transition and provide specific rules and timetables for companies to comply with the National Cap minus the UHF discount. If not, the UHF discount will gut localism and diversity, making the National Cap meaningless and contrary to the purpose of the Order.

B. Duopolies and Triopolies Should Be Counted When Calculating the National TV Ownership Percentage to Reduce the *Potential* Power of a Single Media Company

By ignoring the interplay between the local and national TV ownership rules, the Commission violates its own stated public policy of concentrating too much *potential* power in the hands of a single media outlet. The Order notes the following:

Further, owners of media outlets clearly have the ability to affect public discourse, including political and governmental affairs, through their coverage of news and public affairs. Even if our inquiry were to find that media outlets exhibited no apparent “slant” or viewpoint in their news coverage, media outlets possess significant *potential* power in our system of government. We believe sound public policy requires us to assume that power is being, or could be, exercised.²³

The record contains evidence that reporters and other employees of broadcasting companies alter their news coverage to suit their companies' interests. This suggests that whatever financial interest that media companies may have in presenting unbiased news coverage, those incentives are not the only factors that explain news coverage decisions.²⁴

As we have explained, “the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at

²² Order at ¶ 273.

²³ Order at ¶ 28.

²⁴ Order at ¶ 29.

the regional level.”²⁵

CBC’s analysis of the Order finds that a single company can exert tremendous influence on the political process at the national, state and local levels as a result of the new national TV cap, the UHF loophole, and the expanded local TV ownership rule – resulting in a single company having an inordinate effect on public opinion and significant power in our system of government. Through its ownership of local television stations, a single company could influence the outcome of the election of 98 U.S. Senators, 382 members of the U.S. House of Representatives, 49 governors, and 49 state legislatures, as well as countless local races.²⁶ Based on CBC’s analysis, a single company could own television stations under the following scenarios:²⁷

- At least one television station in every market in every state except California (199 of 210 TV markets). In 139 of the markets, the company could own two stations, and in 4 markets, the company could own three stations.
- At least one VHF station in every TV market in 40 states or in the nation’s six most populous states (California, New York, Texas, Florida, Pennsylvania and Ohio).
- Up to 48 stations in 21 TV markets (at least one VHF in markets 1 through 21).
- Up to 310 stations in 177 TV markets (at least one VHF in markets 23 through 210) - 23.05% of all full-power commercial TV stations.
- Up to 237 UHF stations in 117 markets (markets 1 through 117) - 17.62% of all full-power commercial TV stations.
- Up to 369 UHF stations in 208 TV markets (all except New York and Los Angeles) - 27.43% of all full-power commercial TV stations.
- Or a company could focus its strategy on a selected state, a region or a collection of states for whatever reason. For example, under the new rules a single company could own 32

²⁵ Order at ¶ 38.

²⁶ Note that the same single company could also own newspapers, radio stations, cable companies, national cable channels, Internet sites and magazines, but for this purpose, CBC simply addresses the number and locale of local television stations.

²⁷ See Appendix A.

TV stations in Texas, 24 in California, 15 in New York, 13 in Michigan, 11 in Tennessee, and 11 in North Carolina.

To accomplish its sound policy objective of limiting the *potential* power of a single media company and the Commission's assumption that power is being, or could be, exercised, the Commission should reconsider the power resulting between the interplay of the new national TV ownership cap at 45%, the UHF loophole giving the National Cap a 90% effect, and the local TV rule expanding duopolies and adding triopolies. Part of this reconsideration should be to include duopolies and triopolies in the national TV ownership cap calculation.

III. THE COMMISSION SHOULD UNDERTAKE A COMPREHENSIVE REVIEW OF THE COLLECTIVE IMPACT OF THE NEW RULES TO DETERMINE IF THE RESULT PROMOTES THE PUBLIC INTEREST. IF NOT, THE COMMISSION SHOULD RECONSIDER AND REVISE ITS RULES ACCORDINGLY, WITH INPUT FROM THE PUBLIC.

The Commission should review the collective impact of the new rules on a national, state and local level to determine if the results of that review are consistent with the public interest and its core values of localism, diversity and competition. If not, the Commission should reconsider and revise its rules accordingly. Although the Commission analyzes each rule individually and gleans cursory guidance from its Diversity Index, the Commission fails to provide a thorough analysis of the impact of all the rules on what a single company can own. Examples of the interplay between the national and local TV ownership rules are addressed above. Further empirical data is provided in Appendix A on a market-by-market, state and national basis.

The impact of the collective rules is of particular concern to viewpoint diversity. "It has long been a tenet of national communications policy that the widest possible dissemination of

information from diverse and antagonistic sources is essential to the public welfare.”²⁸ The Commission notes this policy is given effect through the regulation of broadcast ownership.²⁹ The Commission further states “[V]iewpoint diversity is a paramount objective of this Commission because the free flow of ideas under-girds and sustains our system of government”³⁰ and “[W]e adhere to our longstanding determination that the policy of limiting common ownership of media outlets is the most reliable means of promoting viewpoint diversity. Nothing in this record causes us to reconsider this conclusion.”³¹ If viewpoint diversity truly is the paramount objective of this Commission, then it should begin an immediate thorough analysis of what a single company can own based on the interplay of all the rules and reconsider rules to achieve that objective, with input from the public.

IV. CONCLUSION

For the foregoing reasons, CBC respectfully requests that the Commission reconsider and reverse the Order to the extent that it retains the UHF loophole and that it does not include duopolies and triopolies in calculating the ownership percentage in the national TV ownership rule. Further, the Commission should undertake an extensive analysis of the impact of the collective rules on what a single media company can actually own to determine if it is in the public interest and consistent with the Commission’s paramount objective of preserving

²⁸ *Turner I*, 512 U.S. at 663-64 (internal quotation marks omitted) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

²⁹ Order at ¶ 19.

³⁰ Order at ¶ 32.

³¹ Order at ¶ 26.

viewpoint diversity. If not, the Commission should reconsider and revise the rules accordingly, giving the public an opportunity to review the Commission's analysis and comment.

Respectfully submitted,

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Appendix A

CBC Petition for Reconsideration